No. 11 8

In the Supreme Court of the United States

OCTOBER TERM, 1945

LUMBER PRODUCTS ASSOCIATION, INC., (a corporation), et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief of Lumber Products Association, Inc., et al., After Restoration of Cause to the Docket

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On June 18, 1945 the Court ordered this case and its companions, Nos. 9, 10, 12 and 13[1] restored to the docket and assigned for reargument, and it requested counsel to discuss in their briefs and upon oral argument certain questions. As we understand them, the questions appear to pertain to the parties in Cases 9, 10 and 12, and not to the issues in this case.

However, on the same day, June 18, 1945, this Court handed down its decision in the case of *Allen Bradley*

1. Respectively, Nos. 668, 666, 667, 674 and 675 in the October term, 1944.

Company, et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., Case No. 702, 324 U.S. ....., 89 L. Ed. (Adv. Op.) 1441. That decision becomes a necessary point of departure in the further consideration of this case, but it still left certain basic questions unanswered.

We submit this brief in order to discuss the application of the *Allen Bradley* decision.

So far as they go, the principles there enunciated are, we submit, the very principles for which we contended in our brief filed here in February 1945, and confirm our position. We said in that brief (at p. 42), "* * * if the decision of the Circuit Court of Appeals for the Second Circuit is correct in the *Allen Bradley* case, the decision of the court below in the instant case is necessarily incorrect. On the other hand, the Circuit Court of Appeals in the *Allen Bradley* case may be in error, and still the decision of the court below in the instant case would be erroneous, for the *Allen Bradley* case is an infinitely stronger case for illegality than the present; * * *."

We submitted in our brief of February:

(1) That, under the labor statutes such as the Norris-La Guardia Act, the decisions establish that an agreement between labor elements alone, for selfish purposes, *is wholly immune* from the Sherman Act, although it restrains interstate commerce (Brief, p. 31);

(2) That a combination between labor and employers enjoys no such *absolute immunity* (Brief, p. 31); i.e., that the participation of employers suffices to destroy the absolute immunity;

(3) That, nevertheless, the mere fact that employers participate in the combination does not render the com-

bination illegal; while absolute immunity is gone, legality is to be tested by certain other factors, by judgments "regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end" and the like (Brief, pp. 31, 32).[2] As we read the decision, this Court in the *Bradley* case has confirmed the correctness of each of these contentions.[2]

The next and crucial question is: How is the wisdom or unwisdom, the reaonableness or unreasonableness,—in short, the legality of the agreement,—to be determined?

This question, we submit, is not wholly answered by the *Bradley* decision. Agreements are not illegal merely because they restrain trade. Nor is an agreement restraining trade illegal merely because it does not find exemption in the immunizing provisions of the recent labor statutes. While this Court said in the *Bradley* case that "the exemptions granted the unions were special exceptions to a general legislative plan,"[3] nevertheless we are not confined, in answering the fundamental question, to examining the subject of union immunities or to finding protection in some special exception to a general plan. We go to the general plan itself, and we may, we submit, examine the reasonableness of the combination under the "rule of reason"; and to that end we may look

2. Thus this Court said: "Our holding means that the same labor union activities *may or may not be* in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." It did not say that the same labor union activities *are or are not* in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. 89 L. Ed. (Adv. Op.) 1448 (2d col.).

3. 89 L. Ed. (Adv. Op.), p. 1448 (1st col.).

to the views of Mr. Justice Holmes, Mr. Justice Brandeis, and the present Chief Justice, expressed many years ago (see our brief of February 1945 at pp. 30 and 32).[4]

We submitted in our brief of February 1945 that the test must be an *objective* one. Any *subjective* test, despite any certainty that it may appear to have in its statement, will lead to complete confusion in practice, and it will be impossible, for anyone active in labor organization or in business, to apply it in determining the legality of proposed conduct.

We submit that the objective test can be nothing other than this: Whether the agreement or combination is or is not directly or rationally related to the improvement of working standards.

In the *Bradley* case this Court stated that the question there was "whether unions can with impunity aid and abet businessmen who are violating the [Sherman] Act."[5] With the question so stated, the answer necessarily must be in the negative, as our brief of February 1945 frankly pointed out (pp. 44, 45, et seq.). But in the instant case, this statement of the issue only forces the question one step backwards, because the question still remains whether by the combination with labor the businessmen are in fact violating the Act.

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4. As we said in our brief of February 1945 (at p. 30): "We submit, decision does not rest merely on any question whether a labor dispute exists or has ceased, or on any considerations of recent statutes. Quite independently of the decisions beginning with *United States v. Hutcheson*, supra, and of the statutes underlying those decisions, an agreement such as is here involved should be deemed legal, because it is not unreasonable."

5. 89 L. Ed. (Adv. Op.), p. 1447 (1st col.).

This Court in the *Bradley* case also stated and negatively answered[6] the question whether unions may, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. That they may not do so we conceded in our brief of February 1945 (pp. 42 to 45), where we pointed out the fundamental differences between a case such as that and the present. But there is a converse question: whether non-labor groups may combine with unions to improve and protect labor standards. True, such combination may restrain trade, but it is recognized that the protection of labor standards may, without violation of the Sherman Act, result in or require restraints on the marketing of goods and services; that recognition is both explicit and implicit in the *Allen Bradley* case.[7]

We have submitted that no subjective test is feasible. Legality should not be determined by asking whether the business elements in the combination were induced to participate by the motive or the purpose of forwarding their own interests rather than by a motive of promoting the interests of labor. Such an inquiry will inevitably lead into a morass of speculations. All people act for their own interest; employers normally grant labor demands in order to be free of economic disadvantages that would flow from refusal.

If a subjective test were to control, two identical agreements producing the same results would be diversely legal and illegal, and the same agreement would be held legal or illegal, depending upon what a jury should read into

6. 89 L. Ed. (Adv. Op.), p. 1447 (1st col.).
7. Cf. 89 L. Ed. (Adv. Op.), p. 1448 (2d col.).

the minds of the defendant,—indeed, not the actual mind of any particular defendant, but the fictitious collective mind of a conspiracy wherein fragments of every participant's purposes and acts are added to those of others to make a composite guilt. To apply these observations: The agreement in the present case was simply that the employers would not handle, and labor would not work upon, materials produced under labor standards inferior to those created by the collective bargaining contract in which the provision was contained. That agreement unquestionably was directly and rationally related to the protection and improvement of labor standards. *In none of its briefs has the government ever disputed that fact.* No agreement between employers and unions, other than one merely fixing wages and working conditions between the contracting parties, could be more strictly confined to the protection of labor standards than the agreement of this case. In the *Allen Bradley* case this Court said:[8]

> "Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act."

Now we submitted in our brief of February 1945 (at p. 22),

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8. 89/L. Ed. (Adv. Op.), 1447 (2d col.).

> "There can be no question of the exceptionally close relation between the protection of labor interests and a rule excluding from the local area materials produced under inferior labor standards. Such a rule has far closer connection with labor's ultimate end, than, for example, union and closed shop rules. The better reasoned decisions have always held that boycott rules and other conduct designated to enforce all union shops were legal and non-violative of the Sherman Act though interstate commerce was directly restrained, on the ground that unionization was reasonably related to the immediate and legitimate interest of preserving wages and working conditions * * *."

Clearly the present agreement is more closely related to preserving wages and working standards than one excluding goods produced by non-union shops, because a union shop is a means to an end and not the end. A union shop in another community may still have labor standards inferior to those locally prevailing, and a non-union shop may have standards equally high. In this case, if the goods were produced by a mill maintaining the standards of wages and working conditions embodied in the Bay Area collective bargaining agreement, the agreement did not prevent the purchase of or the performance of work on the goods, though they were obtained from a non-union shop either in or out of California; and, on the contrary, if the goods were produced in a mill with standards less favorable to labor than those in the Bay Area, the agreement excluded the goods though produced in California or in a union shop.

In the oral argument before this Court on March 13, 1945, the Honorable Wendell Berge, Assistant Attorney General, in contending that combinations such as the one

in this case are illegal "irrespective of whether they grow out of any labor dispute," said explicitly, "And it is immaterial who instigates the agreement." The Assistant Attorney General thus agreed with the position we had taken in our brief of February 1945 (at pp. 38, et seq.), that the source of the clause is irrelevant, and that the manner in which the clause found its way into the collective bargaining agreement, whether at the request of unions or employers, is not material to the question of its legality. We submit that Mr. Berge's contention that the agreement is illegal although imposed by the unions has been demonstrated to be unsound by the *Bradley* decision. We assume that it will now be conceded that, under that decision, there was no violation of the Sherman Act, if the defendant unions here imposed the non-handling clause on the employers because the handling of materials produced under inferior labor standards would necessarily break down local labor standards.[9] We believe that is the implication, if not the holding, of the *Allen Bradley* case in the part of the opinion which is quoted at page 6 above. If, on the other hand, the unions did not impose the clause, but the employers requested it in order to enable them to grant the union's demands for higher wages and superior conditions,—as the government has contended;[10]—the relation of the clause to the protection and improvement of labor standards is precisely the same. Its effect on the public is the same, and its legality, we submit, is therefore the same. Legality of an agreement should not depend upon whether one or more of the employers be-

9. In fact, the condition was imposed on the employers and for just that purpose.

10. See our brief of February 1945 at pp. 42, et seq.

lieve that the agreement will serve his or their own interest as well, or forsooth, on whether a jury might so believe.

In his concurring opinion in the *Bradley* case, Mr. Justice Roberts stated his belief that "The situation created" by the holdings of this Court "is unreal," that "the law as announced by the court creates an impossible situation * * * and leaves commerce paralyzed beyond escape," and that "this Court, as a result of its past decisions, is in the predicament that whatever it decides must entail disastrous results." We submit that if the test of legality in the case of a combination in which employers participate is the objective test propounded above, Mr. Justice Roberts' observations lose much of their pertinence.

While we submit that the objective test is the correct test of legality of a combination involving employers and unions, even under a subjective test the agreement of the instant case would be legal. To contend that the economically weak and impoverished little businessmen,—the small mill operators,—in the present case were other than the tail of the dog in the Bay Area would be to advance a sardonic joke, and no one has ever advanced it. As we have noted, the government itself, although charging that the employers requested the clause, has said that they did so, not to obtain a monopoly or to maximize profits, but merely to enable them to pay the wage demands and to maintain the labor standards upon which the unions were insisting.

The difference between the facts of the present case and those of the *Allen Bradley* case is so wide as hardly to require discussion. As we pointed out in our brief of

February 1945 (at p. 41), in the *Bradley* case the agreement, not only in its basic purpose but in its necessary effect and by its express terms, excluded from New York City all out-of-state goods *per se*, without regard to the labor standards under which they were produced and without any possibility that out-of-state manufacturers could by any manner of compliance or acquiescence bring their goods into the city. And, according to this Court, the employer-employee agreements of the *Bradley* case "expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control."[11] In the present case (as we have pointed out in our brief of February 1945, pp. 9-12), the indictment does not charge price fixing; the government conceded this to be so, for it said (Government's Brief, February 1945, p. 39): "It is therefore unnecessary to consider whether the indictment is to be construed as charging 'price fixing'."[12] This Court also noted that in the *Bradley* case the combination between businessmen and employees "intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers."[13]

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11. 89 L. Ed. (Adv. Op.), 1442 (2d col.); 1443 (1st col.).

12. As its reason the government stated that the indictment charged a conspiracy having the effect and purpose of raising prices, of a kind held illegal in *American Column & Lumber Co. v. United States*, 257 U.S. 377. But that contention is merely an argument from the fact that higher wages and superior labor standards, protected by an agreement such as is here involved, may mean higher prices to the public.

13. 89 L. Ed. (Adv. Op.), p. 1443.

We submit that had there never been a *Norris-La Guardia Act* and had *United States v. Hutcheson*, 312 U.S. 219, never been decided, the agreement in the present case would still be entirely legal because by any objective test it was rationally and directly related to the improvement and protection of labor standards and was therefore not an unreasonable restraint.

At the same time the policy underlying that statute and that decision is pertinent. It was a commonplace that the reasonableness of the restraint of interstate commerce, not the mere fact of restraint, determined legality. But with respect to the significance of reasonableness there have been two opposite trends in more recent years. In cases of combinations involving labor alone, reasonableness has been abolished as a test, and the combination is legal though unreasonable. In cases involving only "capital", reasonableness as a test has not been abolished, but there has been a tendency to recognize less frequently that any particular restraint is reasonable. In a combination involving both labor and "capital", these two trends are in conflict. This Court remarked in the *Bradley* case that there is a conflict between the declared congressional policy which seeks to preserve a competitive business economy and the congressional policy which seeks to preserve the rights of labor to organize to better its condition through the agency of collective bargaining.[14] The two policies must be reconciled, not merely verbally, but in operation. They can be reconciled *by balance at the mean point, re-emphasis on reasonableness.* "Reasonableness" is a standard of *objective* appraisal. And, in

14. 89 L. Ed. (Adv. Op.), p. 1436 (2d col.).

view of the fact that the congressional policy which seeks to preserve the rights of labor to organize to better its conditions is the later and more recently evolved policy, in determining reasonableness the balance-scale should be sensitive to the labor factors in the situation,—to the effect of the agreement on labor interests.

If, in determining what combinations between labor and employers are legal and what illegal, it is necessary to follow the traditional technique of picking out a line from case to case, we submit that the present case illustrates a clearly legal agreement, and that the case of *Albrecht v. Kinsella*, 119 F.(2d) 1003 (7 Cir.), illustrates an agreement which in the interstate field would be clearly illegal. The instant case, we submit, lies at the extreme end of the legal side of the spectrum.

It is respectfully submitted that the indictment states no offense, that the demurrers should have been sustained, and that the judgments of conviction should be reversed with direction to dismiss the indictment.

Dated: San Francisco, California, October 8, 1945.

Respectfully submitted,

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